LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
JUN 6 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, [redacted] 1969

No. [redacted] 31

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

BRIEF OF APPELLEES JOSEPH A. CIPOLLONE, DIRECTOR, JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES, SAUL G. STILLMAN, MEMBERS OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS.

JOHN T. CORRIGAN,
Prosecuting Attorney of
Cuyahoga County, Ohio,
Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,
Counsel for Appellees,
Joseph A. Cipollone, Director
John J. Carney, Dan W. Duffy,
Robert Hughes, Saul G. Stillman,
Members of the Cuyahoga County
Board of Elections.

JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Questions Presented for Review 1

Statement of the Case 2

Argument 3

I(A). The Seven Percent Statute in Issue Here Section 3513.257 of the Ohio Revised Code, Has Not Been Held Unconstitutional or Void by This Court in *Williams v. Rhodes*, 393 U.S. 23 (1968) 3

I(B). There Is No Evidence That the Seven Percent Statute Abridges Any Fundamental Rights Which Are Protected Against Abridgment by the States by the First and Fourteenth Amendments 3

II. This Court Should Not, on an Appeal, Constitute Itself as a Trial Court to Entertain and Consider Matters Which Were Not in Evidence in the State Trial Court and Are Here Presented Solely by Way of the Appellant's Brief 10

III. The Instant Case Is Moot in View of the Fact That the Election at Which the Appellant Desired to Be a Candidate Has Long Since Passed, the Fact That the Appellant Was Guilty of Delay in Filing This Case, and the Fact That the Appellant Chose Not to File in the Highest State Court Despite the Fact That the Supreme Court of Ohio Had Original Jurisdiction in an Action of This Kind 12

TABLE OF AUTHORITIES.

Cases.

Coffelt v. Bryant, 381 S.W. 2d 731 (1964) 6

Dancy v. Hunt, 294 S.W. 2d (1956) 8

Klein v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 699 5

McDonald v. Board of Elections, Commissioners of Chicago, 89 S. Ct. 1404 (1969) 9

McGowan v. State of Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 9

Moskowitz v. Board of Elections in City of New York, 274 N.Y.S. 2d 93 (1966) 5

Orsini v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 698 5

People, ex rel. Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) 4

State ex rel. Meek v. Board of Deputy State Supervisors, 111 Ohio St. 203 (1924) 11

Williams v. Rhodes, 89 S. Ct. 5, 21 L. ed. 2d 24 (October 15, 1968) 3, 13

Young v. Heffernan, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697 5, 6

Texts.

3 *Am. Jur. Appeal and Error*, Sec. 835, p. 377 10

21 *Ohio Jur. 2d*, Evidence, 23, p. 42 11

21 *Ohio Jur. 2d*, Evidence, Sec. 56, p. 70 11

Ohio Constitution and Statutes.

Ohio Constitution, Art. IV, Sec. 2 12

Ohio Revised Code

Sec. 3513.04 7

Sec. 3513.257 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 921.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,

Appellees.

BRIEF OF APPELLEES JOSEPH A. CIPOLLONE, DIRECTOR, JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES, SAUL G. STILLMAN, MEMBERS OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS.

QUESTIONS PRESENTED FOR REVIEW.

The appellees, members of the Board of Elections of Cuyahoga County, Ohio, and the Director of Elections of Cuyahoga County, Ohio hereby state, in accordance with Rule 40 (3) of the Rules of the Supreme Court of the United States, that they accept Question No. 1, but that they disagree with the statement contained in the appellant's brief as to the other questions presented for review. It is contended that the only other questions before the Court in the posture in which this case has been presented are as follows:

2. Will this Court constitute itself as a court of first instance, a trial court, to entertain and consider matters which are presented to it solely by way of the appellant's brief and which were not in evidence in the state trial Court?

3. Is not the instant case moot in view of the fact that the election at which the appellant desired to be a candidate has long since passed, the fact that the appellant was guilty of delay in filing the case, and the fact that the appellant chose not to file in the highest state Court, which had jurisdiction, but chose instead, to file the case in the lowest Court of general trial jurisdiction and to allow the case to be long delayed in its ultimate presentation to this Court?

STATEMENT OF THE CASE.

The Board of Elections and the Director of Elections have no objection to the recital contained in Part I of the appellant's Statement of the Case. However, the "historical context" set forth in Part II is wholly improper for the reason that the factual allegations therein are not in the evidence presented to the Court of Common Pleas.

ARGUMENT.

I(A). THE SEVEN PERCENT STATUTE IN ISSUE HERE, SECTION 3513.257 OF THE OHIO REVISED CODE, HAS NOT BEEN HELD UNCONSTITUTIONAL OR VOID BY THIS COURT IN WILLIAMS v. RHODES, 393 U.S. 23 (1968).

The Socialist Labor Party case, *Williams v. Rhodes*, 89 S. Ct. 5, 21 L. ed. 2d 24 (October 15, 1968), *did not* hold that Ohio election laws setting requirements for independents are unduly restrictive and are unconstitutional and did not render the seven per cent requirement void.

This Court did not even have before it the question of the constitutionality of R. C. 3513.257. Anything that appears in the opinions in that case on the subject of independent candidates is obiter dictum. It is highly significant that Brockington fails to call to the attention of this Court anything in the Journal Entry or order of the United States District Court in the Socialist Labor Party case making any order in regard to independent candidates, other than to provide a space for write-in votes.

I(B). THERE IS NO EVIDENCE THAT THE SEVEN PERCENT STATUTE ABRIDGES ANY FUNDAMENTAL RIGHTS WHICH ARE PROTECTED AGAINST ABRIDGMENT BY THE STATES BY THE FIRST AND FOURTEENTH AMENDMENTS.

Brockington has failed to present *evidence* to show that R. C. 3513.257 is unnecessary or unreasonable, and has failed to cite any authority requiring a holding that the statute is unconstitutional.

Throughout this case, Brockington has adopted the approach of attempting to cast the burden of proof upon the respondents-appellees (appellant's brief, pp. 19-20). No authority is cited for transferring the burden of proof

Brockington offered nothing in the way of proof in the trial court in an effort to show that the enactment of R. C. 3513.257 was unnecessary or unreasonable. Some statistics were argued by means of injection into the Brockington trial brief. Not only was there no duty on the part of the trial court to take judicial notice of the statistics, but the record fails to disclose that judicial notice was actually accorded. This could have been cleared up by findings of fact and conclusions of law, but Brockington did not seek same.

Counsel for Brockington admitted in oral argument in the trial court that no Federal Court has made a decision declaring a statute unconstitutional in any situation closely resembling the factual matters before this Court.

Counsel for Brockington, being challenged in oral argument in the trial court to name even one case in which a State Court had declared a similar statute unconstitutional, attempted to revert solely to the case of *People, ex rel. Hatchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912), cited at page 24 of the Brockington brief. There is not the faintest resemblance between the statute which the court struck down in that case and the statute which is now up for consideration before this Court, namely Ohio Revised Code Section 3513.257. The actual rationale of the court becomes apparent upon a full reading of the *Hotchkiss* case and it is no authority in the present case. The *Hotchkiss* court at page 572 of the N.E. Report said:

> "In the county of Putnam the average total vote at general elections is a little over 3,000. In Schuyler and Yates counties it is less than 4,000 in each county, while in Hamilton county the average vote is about 1,200 or at least less than 1,500.
>
> "A statutory provision requiring the signatures of 1,500 or even 1,000 voters to entitle a person to file a

> certificate for independent nominations is, in view of the total number of voters in some of the counties of the state, manifestly unreasonable as a matter of law, and the unconstitutionality of the requirement is so clear that it does not make necessary any discussion of that question by us."

It is beyond comprehension how Brockington can derive any comfort from the unconstitutionality of a statute which imposed a flat burden of an absolute minimum number of signatures without regard to the number of voters in any particular district. This bears no similarity whatsoever to the Ohio statute, which clearly recognizes the breadth of the base of the electors in any given area by simply imposing a percentage requirement. Thus, in any circumstances in which a would-be independent candidate is required to obtain a greater number of signatures it is simply and only because he has a greater number of electors from whom to choose and, as the court observed in *Moskowitz v. Board of Elections in City of New York*, 274 N.Y.S. 2d 93 (1966), at page 98:

> "* * * The legislature obviously considered that signers of a petition for the nomination of a regular party candidate must be enrolled in the party, whereas signers of an independent nominating petition may be voters who are enrolled in any party and also those who are not enrolled. The charge that the statute is unfair and discriminatory has been considered by the courts of this state and the contention has been rejected."

The Court in *Moskowitz* was referring primarily to three New York cases decided on the same day, October 25, 1946: *Young v. Hefferman*, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697; *Orsini v. Hefferman*, 70 N.E. 2d 531, 296 N.Y. 698, and *Klein v. Hefferman*, 70 N.E. 2d 531, 296 N.Y. 699.

In the case of *Young v. Heffernan* in which the court rendered an opinion which was followed in the *Orsini* and *Klein* cases, the Court of Appeals of New York upheld a statute which required an independent to obtain 7% of the signatures of the electors with a maximum of 3,000 signatures in a congressional district. At page 607 of the *Young* decision, the court indicated that any question of parity between an independent group and a political party is *for the legislature and not for the court to determine.*

At this point it should be observed that, so far as counsel for the Board of Elections has been able to determine, no court, Federal or State, has struck down as unconstitutional a statute requiring an independent to obtain the signatures of 7% of the electors of his area or district.

During oral argument in the trial court, counsel for the Board of Elections cited the case of *Coffelt v. Bryant*, 381 S.W. 2d 731 (decided September 14, 1964) in which the Supreme Court of Arkansas upheld a statute which required an independent candidate to file nominating petitions with 15% of the total votes cast for Governor. On the subject of a lesser requirement for a party candidate, the court in *Coffelt v. Bryant* stated very cogently its views as to why an independent candidate may, within the proper and legitimate exercise of discretion by the legislature, be required to furnish considerably more signatures. At page 35, the court said:

> "This may well have been the reasoning of the General Assembly: The regular candidates who run for office are required to pay extensive filing fees which are used by the party to defray the expense of holding Primary Elections. In many cases these candidates are faced with strong opponents, and they are required to carry on a time-consuming and expensive campaign. After they have won the election and have become the successful nominees they should not be

faced with Independent Candidates who have paid only a $37.50 filing fee and secured a petition with not less than 50 names signed by qualified electors, unless these Independent Candidates can show a public demonstration and demand for their election. If this condition should exist, it would not be too difficult for the Independent Candidate, where there is no vacancy, to secure a petition signed by not less than 15 per cent of the qualified electors at the last election. To permit an Independent Candidate to run for office where there is no vacancy without securing a petition signed by 15 per cent of the qualified electors would be unfair and unjust to the regular candidate who had been nominated for office. In addition to being unfair and unjust it could easily be argued that this would amount to a discrimination against the regular nominee."

It is the statutory philosophy of Ohio that a person should not be allowed to alternate indiscriminately between party affiliation and political independence, being an independent candidate. This philosophy is expressed in the second paragraph of Section 3513.04 of the Revised Code, as follows:

"No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in."

It is true that there is not a specific legal prohibition against an individual who votes in a party primary to prevent him from being an independent candidate in the next following general election. However, when one seeks to have a court grant the high prerogative writ of mandamus, it is not fitting that the seeker thereof be one who blows hot and cold politically and who, it may be said, is neither fish nor fowl when it comes to adhering to the nature of

his political persuasion. Brockington admitted in his testimony in the trial court that, while seeking office as an independent, he voted in the Democratic primary in May, 1968 (A. 22, R. 21).

The Texas case of *Dancy v. Hunt*, 294 S.W. 2d (1956), in the Court of Civil Appeals of Texas dealt with this problem. In that case the independent candidate complied with the statute requiring her to have the signatures of 5% of the electors in the precinct for County Commissioner. The independent candidate had voted in the party primary. The party nominee brought a mandamus action and argued that the independent had a duty to support the nominee of the party in whose primary she had voted. The court refused the writ of mandamus in that case but indicated that had the county judge refused to place the independent candidate on the ballot, such an independent, if she sought a writ of mandamus, would not be coming into court with clean hands. The court noted that although there is no legal obligation, there is a moral obligation for a voter in a primary election to support the nominee of that primary.

On the subject of the statute's claimed violation of the First Amendment, counsel for the Board of Elections believes that the constitutional provisions for majority rule and for the best exercise of the democratic process in this nation envision the principle that a candidate for any office is in fact seeking to be *elected* to that office. If that principle is accepted, the strong trend of philosophy running through the reported cases in this area shows that a candidate for public office should be required to show some marked demonstration of public support, inasmuch as a candidate can win only with a majority, in cases where there are two candidates, or a plurality, in which there are three or more. It is not unreasonable for an independent

candidate to show that he has the support of 7% or more of his fellow citizens in the area in which he seeks office. If a candidate and his friends and supporters are unwilling, or unable to obtain the signatures of such a small fraction of the electorate (having full lance at Democratic, Republican, and nondeclared voters) his prospects for election would be minuscule, and he can only be characterized as a spoiler. Viewed as an exercise in the expression of dissent or as an opportunity for manifestation of *free speech*, a candidate does not logically complain in this regard because every actual or potential voter who is approached for the purpose of obtaining his signature on a nominating petition becomes a sounding board for the expression of the would-be candidate's political philosophy.

On the subject of the statute's claimed violation of the Fourteenth Amendment as to equal protection, Brockington's argument fails when the evidence in this case is measured in the light of the standard of equal protection:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. State of Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1104, 6 L. Ed. 2d 393.

and in the light of the restatement of the standard by Chief Justice Warren in *McDonald v. Board of Elections, Commissioners of Chicago*, 89 S. Ct. 1404 (1969), at page 1408:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently,

> and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

It may be seen that Brockington's constitutional argument is wholly without merit.

II. THIS COURT SHOULD NOT, ON AN APPEAL, CONSTITUTE ITSELF AS A TRIAL COURT TO ENTERTAIN AND CONSIDER MATTERS WHICH WERE NOT IN EVIDENCE IN THE STATE TRIAL COURT AND ARE HERE PRESENTED SOLELY BY WAY OF THE APPELLANT'S BRIEF.

A cursory perusal of the Appendix filed in this case, together with an examination of the appellant's brief, immediately reveals that the appellant is seeking to have this appellate court act as a trial court by receiving voluminous documents, none of which was offered in evidence in the Court of Common Pleas.

It seems almost too elementary to point out the impropriety of presenting evidence on appeal. The principle is set forth in 3 *Am. Jur. Appeal and Error*, Sec. 835, p. 377:

> "It is a well-settled rule that, except as otherwise provided by law, new evidence cannot be considered on appeal; the appeal must be decided solely on the evidence produced in the court below and shown by the record."

It may be observed that the appellant Brockington is improperly seeking to have the court take judicial notice of Ohio Election Statistics, a matter which was not introduced by testimony or stipulation and thus was not in the evidence submitted to the trial court *during the trial* of this action. It is not enough for Brockington to have injected statistics into his legal argument in his trial brief. A volume which was gratuitously filed by the appellant with the Court of Appeals is not a part of the record in the trial court and was not entitled to judicial notice by the Supreme Court of Ohio or by this Court. The rule is set forth in 21 *Ohio Jur.* 2d, Evidence, Sec. 56, p. 70, the last paragraph of which states as follows:

> "A reviewing court is confined to the record and may not know judicially anything not appearing therein, at least as to those matters which the lower court was not *required* to judicially notice." (Emphasis ours.)

Brockington has cited in his brief (p. 8) the case of *State ex rel. Meek v. Board of Deputy State Supervisors*, 111 Ohio St. 203, a 1924 case. It is important to note two aspects of that case. 1) The statement that the Supreme Court of Ohio *may* take judicial notice of the Secretary of State's election statistics (at p. 210) is obiter dictum, and is not carried into the syllabus of that case, 2) that the *Meek* case was an original action in mandamus in the Supreme Court of Ohio and did not come up to that court on appeal.

As to the permissive use of judicial notice by a trial court rather than a court of appeals, the rule is stated in 21 *Ohio Jur.* 2d, Evidence, 23, p. 42, as follows:

> "Discretion of Court.—Among the matters of which the courts will take judicial notice there is one class of which a court is bound to take judicial notice

and another class of which it may, in its discretion, take notice. The courts are bound to take judicial notice of the public statutes and the general laws of the forum and of the statutes of every state, territory, and other jurisdiction of the United States. With respect to all matters of fact, however, the rule as to judicial notice is based upon an essentially different principle. Of such matters the court may, in a proper case, take judicial notice, but it is not generally bound to do so. This discretion of the court to take judicial notice of matters of common or universal knowledge should be exercised with caution."

III. THE INSTANT CASE IS MOOT IN VIEW OF THE FACT THAT THE ELECTION AT WHICH THE APPELLANT DESIRED TO BE A CANDIDATE HAS LONG SINCE PASSED. THE FACT THAT THE APPELLANT WAS GUILTY OF DELAY IN BRINGING THIS CASE AND THE FACT THAT THE APPELLANT CHOSE NOT TO FILE IN THE HIGHEST STATE COURT DESPITE THE FACT THAT THE SUPREME COURT OF OHIO HAD ORIGINAL JURISDICTION IN AN ACTION OF THIS KIND.

This matter comes before this Court in the conclusion of a litigation journey which had a genesis after it began in the U. S. District Court for the Northern District of Ohio where Paul M. Brockington and others filed a Complaint concerning the same subject on or about April 28, 1968. Ultimately that Complaint was voluntarily dismissed by the plaintiffs on or about June 27, 1968.

Subsequently, Paul M. Brockington chose not to take advantage of his constitutional right to invoke the original jurisdiction of the Supreme Court of Ohio (Art. IV, Sec. 2 of the Ohio Constitution) to mandamus and filed his petition in the Common Pleas Court of Cuyahoga County on July 10, 1968. Brockington also chose not to file in the U. S. District Court for the Southern District of Ohio

despite the fact that such action was taken by the Socialist Labor Party in its case in which it was represented by the same counsel as Brockington. The Socialist Labor Party enjoyed a direct appeal to this Court, *Williams v. Rhodes*, 89 S. Ct. 5, 21 L. ed. 24; and Brockington could have had a direct appeal to this Court before the election of November 5, 1968. In view of the fact that a constitutional question is alleged and Brockington apparently designed this case for decision ultimately by this Court, his voluntary detour through the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio is inexplicable but weighs heavily against him on the question of moot[ness]. His own want of diligence made the case moot.

Respectfully submitted

John T. Corrigan
Prosecuting Attorney of
Cuyahoga County, Ohio
Counsel for Appellees

Joseph J. Cipollone, Director
John J. Carney, Don W. Duffy
Robert Hughes, Saul G. Stillman,
Members of the Cuyahoga County
Board of Elections

John T. Corrigan
Assistant Prosecuting Attorney
Of Counsel